PERNAS HOTEL CHAIN (SARAWAK) SDN. BHD.

v.

WALTZ FITNESS RECREATION SDN. BHD.

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[SUIT NO. KG. 146 OF 1991]
22 OCTOBER 1992

INJUNCTION: Defendant's application to set aside interlocutory injunction granted ex parte - Whether injunction should be discharged - Principles applicable to the grant of an interlocutory injunction.

The plaintiff is the owner of the Kuching Hilton Hotel. By a written agreement dated 15 October 1988 the defendant took occupation of a portion of the building for a term of 3 years. The defendant purported to extend the agreement for a further 3 years upon its expiry which was rejected by the plaintiff. The plaintiff gave notice to vacate the premises and upon the defendants refusal to do so, obtained an *ex parte* interlocutory injunction *inter alia* restraining the defendant from entering or remaining on the premises

The defendant sought to set aside the injunction on the grounds that the grant of the injunction *ex parte* was improper and should be set aside without regard to the merits and that there was misrepresentation or supression of material facts in that the plaintiff had referred to the agreement as a licence when it fact it was a lease and/or tenancy.

The defendant further contended that, assuming the *ex parte* order was properly granted, it ought to be set aside having regard to the merits.

Held:

[1] To entitle the dissolution of an interlocutory injunction on the ground of suppression of fact, the fact not disclosed must be material and the suppression has to be of such a character as to mislead the Court or where if the true fact was presented, the Court would probably not have granted the injunction.

[2] There was no suppression or misrepresentation of fact of such a character as to justify the discharge of the *ex parte* injunction on that basis.

[3] Having regard to the evidence from both sides respecting the nature of the defendant's occupation of the premises, it was not appropriate to decide at this stage that there was no serious questions to be tried.

[4] The undisputed evidence of the defendant's failure to pay the monthly sums for occupation of the premises as and when due does not quite stand the defendant in as good a stead as one would wish respecting ability to pay damages, if awarded.

[5] The plaintiff has given an undertaking as to damages and there is no challenge as to its financial ability to pay. Damages would be an adequate remedy to the defendant if it wins the case.

[6] There existed sufficient basis for the application to be heard ***ex parte.***

[Defendants' application dismissed].

Cases referred to:

Professor Dr. A Kahar Bador & Ors. v. N. Krishnan & Ors. [1983] 1 MLJ 407 ***(refd)***

Yeap Mah Ee v. Kuan Kum Chiew & Anor. [1988] 2 MLJ 389 ***(refd)***

American Cyanamid v. Ethicon Ltd. [1975] AC 396 ***(foll)***

Mothercare Ltd. v. Robson Books Ltd [1979] FSR 466 **(refd)**

Street v. Mountford [1985] AC 809 HL ***(refd)***

AG Securities v. Vaughan **(refd)**

Anthoniades v. Villiers [1990] 1 AC 417 ***(refd)***

Wakefield v. Duke of Buccleugh [1865] 12 LT 628 **(refd)**

Ko Ko Ma Pony Horse Centre v. Rasa Sayang Beach Hotel (Pg) Bhd.[1989] 1 CLJ 211/[1989] 1 MLJ 383 ***(cit)***

For the plaintiff - P. Phang; M/s. Reddi & Co.
For the defendant - Francis Ting; M/s. Sio & Ting

JUDGMENT

Chong Siew Fai J:

In this application the defendant seeks to set aside or discharge an interlocutory injunction granted *ex parte* to the plaintiff on 30 December 1991 that the defendant be refrained -

(i) from entering and/or remaining on that portion of the first floor known as the "Fitness Centre" containing an area of 3300 square feet, more or less, on the first floor of the Kuching Hilton Hotel which is situate on all that parcel of land

described as Lot 284, s. 48, Kuching Town Land District or on any part of the said Kuching Hilton Hotel;

(ii) from interfering with the plaintiff's use of the aforesaid premises or any part thereof and/or from interfering or otherwise obstructing with the plaintiff's privacy and enjoyment of the aforesaid premises;

(iii) from intimidating or threatening the plaintiff his servants or agents or otherwise in any manner whatsoever.

Background facts:

The relevant background of the case may be briefly summarised as follows. The plaintiff is the owner of the building known as "Kuching Hilton Hotel". By an unregistered agreement dated 15 October 1988 (Exhibit 'A' annexed to the affidavit of Mohamed Daim bin Dahalan affirmed on 27 December 1991), the defendant took occupation of a portion (premises) on the first floor of the building. The agreement described the plaintiff as the "landlord" and the defendant as "tenant", and employed terminology normally found in a tenancy agreement. It stipulated a term of 3 years from 15 October 1988 to 14 October 1991 at a monthly "rental" of RM9,900. In a letter dated 4 September 1991 the defendant purportedly "agreed" to extend the agreement for 3 years. This, however, was rejected by the plaintiff which contended that any right to extend the term had lapsed and the purported extension was not in accordance with the relevant terms of the agreement. On 8 December 1991 the plaintiff wrote requiring the defendant to vacate the premises on 12 December 1991. By a letter dated 21 December 1991 the plaintiff gave notice of entering possession immediately. As the defendant failed to give up possession, the plaintiff commenced this action claiming, *inter alia*, an injunction restraining the defendant from entering and/or remaining on the premises on the alleged basis that the interest of the defendant in the premises constituted a licence as opposed to a tenancy. By an application, the plaintiff obtained on 30 December 1991 an *ex parte* interlocutory injunction which the defendant now applies to set aside.

For the defendant, Counsel presented its case under 2 issues.

Ex parte application:

Firstly, it was contended that the grant of the interlocutory injunction *ex parte* was improper and should be set aside without regard to the merits. This, as I understand it from Counsel, relates to the hearing of the application *ex parte* on urgent basis. I wish to make clear that it has been and will continue to be my practice that before deciding to hear an application *ex parte* or after service, every such application and the materials in support are examined with a view to satisfying myself that the delay caused by awaiting *inter parte* hearing would or might entail irreparable or serious mischief. For this purpose, the certificate of urgency submitted by or on behalf of the applicant will not be solely relied on.

The *ex parte* application of the plaintiff in the instant case was supported by the affidavit of Mohamed Daim bin Dahalan affirmed on 27 December 1991 and the documents exhibited thereto. It was the case of the plaintiff that the licence (so regarded by the plaintiff) had ended, that the defendant continued to occupy the premises thereby hindering the renovation to be carried out therein, that some third party was to operate therein from 1 January 1992, and the plaintiff was prepared to give an undertaking as to damages. Bearing in mind that the decision to hear an application *ex parte* was an exercise of an extraordinary jurisdiction, I was satisfied on the materials available that there existed sufficient basis for the application to be heard *ex parte*.

Misrepresentation or suppression of fact?

Under the first issue, Counsel for the defendant also submitted that there had been a misrepresentation of fact by the plaintiff in that the affidavit in support deposed to the grant of a licence instead of a lease/tenancy. To entitle the dissolution of an interlocutory injunction on the ground of suppression of fact, the fact not disclosed must be material and the suppression has to be of such a character as to mislead the Court or where if the true fact was presented, the Court would probably not have granted the injunction. *Professor Dr. A Kahar Bador & Ors. v. N. Krishnan & Ors.* [1983] 1 MLJ 407; *Yeap Mah Ee v. Kuan Kum Chiew & Anor.* [1988] 2 MLJ 389.

In our instant case, the plaintiff had produced the agreement and correspondence as exhibits. Whether the occupation of the defendant constituted a tenancy or a licence is a matter for Court to be determined by law and not by the label which the parties choose to put on it. The facts and circumstances including the operative clauses in the agreement need be looked into. Thus viewing the situation, I do not think it can be said that there had been a misrepresentation of fact on the part of the plaintiff by terming the transaction as a licence. The arrangement may eventually turn out to be a tenancy; that is a different matter. But it would not, in my view, be right to conclude that there had been a misrepresentation as alleged. In other words, there is, in my view, no suppression or misrepresentation of fact of such a character as to justify the discharge of the *ex parte* injunction on that basis. And I am also not persuaded that the application ought not to have been heard *ex parte* in the circumstances then prevailing.

Next, it was contended, as the second issue, that assuming the *ex parte* order was properly granted, it ought to be set aside having regard to the merits.

Law:

Is deciding whether to grant an interlocutory injunction, the factors to consider as laid down in *American Cyanamid v. Ethicon Ltd.* [1975] AC 396 are as follows and in that order:

1. Is there a serious question to be tried in the sense that the claim is not frivolous or vexatious, or more precisely, that the plaintiff has prospects of success which, in substance and reality, exist?

   In *Mothercare Ltd. v. Robson Books Ltd.* [1979] FSR 466, Sir Robert Megarry VC said (at 474):

   > The prospects of the plaintiff's success are to be investigated to a limited extent, but they are not to be weighed against his prospect of failure. All that has to be seen is whether the plaintiff has prospects of success which, in substance and reality, exist. Odds against success no longer defeat the plaintiff, unless they are so long that the plaintiff, can have no expectation of success, but only a hope. If his prospects of success are so small that they lack substance and reality, then the plaintiff fails, for he can point to no question to be tried which can be called 'serious' and no prospect of success which can be called 'real'.

   If there is a serious question to be tried, then,

2. Are damages an adequate remedy?
   It is only when there is doubt as to the adequacy of the respective remedies in damages available to either party or to both that the next factor calls for consideration that is,

3. The balance of convenience. Where does it lie?
   The basis for propositions 2 and 3 above may be found in the judgment of Lord Diplock in *American Cyanamid's* case at p. 408:

   > So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.

   Then followed a discussion of adequacy of damages after which the judgment continued:

   > It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises.

4. The existence or otherwise of 'special factors'.
   In our instant case, one of the points raised is whether the agreement dated 15 October 1988 constitutes a monthly tenancy or a licence. (Connected to this are the related matters of who to open and close the fitness centre, key to the centre, permission to hotel guests to use facilities in the centre, construction of the agreement and certain correspondence etc. - See the affidavits filed). As I have briefly mentioned earlier, essentially, the relationship of the parties, (that is, landlord and tenant or licensor or licensee) is to be determined by law on a consideration of all the relevant provisions of the agreement and totality

of the facts and circumstances involving the transaction. *Street v. Mountford* [1985] AC 809 HL; *AG Securities v. Vaughan: Antoniades v. Villiers* [1990] 1 AC 417 @ 463H - 464A. The terms (let, lessor, lessee, licence, etc.) used in an agreement, though a matter for consideration, are not of decisive nature.

Serious question to be tried?

Counsel for the defendant had wished me to decide at this stage that there was no serious question to be tried in that the interest of the defendant in the premises was a tenancy. His contention might eventually turn out to be right. But having regard to the evidence from both sides respecting the nature of the defendant's occupation of the premises, and to the character of this application, that is, to discharge the *ex parte* interlocutory injunction, I do not consider it appropriate and safe to do so at this stage. *Wakefield v. Duke of Buccleugh* [1865] 12 LT 628. Adopting such stand as I find necessary, I do not think it is altogether unfair to the defendant since there is an undertaking by the plaintiff as to damages. One of the reasons for the ordering of giving undertaking as to damages upon the grant of an interlocutory injunction was, as stated in *Wakefield v. Duke of Buccleugh* [1865] 12 LT 628 at 629: "It aided the court in doing that which was its great object, *viz.*, abstaining from expressing any opinion on the merits of the case until the hearing."

The issue is for the main trial, but, if considered suitable, it may be brought up for early determination by appropriate process.

Adequacy of damages:

Next to consider is the adequacy of damages. Here it is necessary to consider whether, if the plaintiff were to succeed at the trial, he could be adequately compensated in damages for loss sustained between the application for the injunction and the trial. If damages would be an adequate remedy and the defendant is able to pay them, then interlocutory injunction will not normally be granted. But if damages would not be an adequate remedy, then the Court will consider whether, if the plaintiff failed at the trial, the defendant would be adequately compensated by an award of damages under the plaintiff's undertaking in damages for the loss the defendant would suffer as a result of the grant of the interlocutory injunction. If so, and the plaintiff would be in a position to pay them, there would be no reason on this ground to refuse an interlocutory injunction. If not, it would be one of the matters to bear in mind in considering the 'balance of convenience'.

The undisputed fact is that the plaintiff was and is the registered owner of the building containing the demised premises housing a fitness centre. On the alleged basis of a licence being granted to the defendant, it is the plaintiff's case that another operator was contracted to take the premises, that the centre is to provide facilities to its hotel guests and that by the alleged wrongful continued occupation of the premises on the part of the defendant, the business and reputation of its business would be adversely affected resulting in irreparable damage. Despite the two affidavits filed on behalf of the defendant, there appears some justification in the plaintiff's contention. Furthermore, the undisputed evidence of the defendant's failure to pay the monthly sums for occupation of the premises as and when due does not quite stand the defendant in as good a stead as one would wish respecting ability to pay damages, if awarded.

For the defendant, it was contended that damages to the defendant's business through disruption was irreparable or incalculable. *Ko Ko Ma Pony House Centre v. Rasa Sayang Beach Hotel (Pg) Bhd.* [1989] 1 MLJ 383 was cited in support. I am not attracted by the argument. In that case, despite the tenancy agreement being for one year, there was evidence of representation that the tenancy would be renewable as a matter of course, and of commitment to improve the premises and related facilities based on a five-year projection. Also, there was no evidence of the defendant (Rasa Sayang Beach Hotel (Pg) Bhd) requiring the premises for immediate use. In our instant case, on the issues as presented, the interest of the defendant is either a licence or, at best, a monthly tenancy determinable by one month's notice. As such the argument of irreparable or incalculable damages due to disruption of business has comparatively little force. Moreover, the plaintiff has given an undertaking as to damages and there is no challenge to its financial ability to pay. In my opinion, damages would be an adequate remedy to the defendant if it wins the case.

For the above reasons and on the undertaking by the plaintiff as to damages, I dismiss the application of the defendant and order that the injunction granted on 30 December 1991 restraining the defendant, be continued until after the trial of this action or until further order. The costs of the application be costs in the cause.

Before leaving the matter, I would make clear that for the purpose of this application, I gave no consideration to the plaintiff's letter marked "Without Prejudice" and dated 7 August 1991, the admissibility in evidence of which the defendant objected to, though some arguments were advanced by both parties on the point.

RE: KHO KAK SIEW
EX-PARTE: MUI BANK BHD.

HIGH COURT, KUCHING
TUAN HAIDAR BIN MOHD NOOR J.
[BANKRUPTCY NO. 468 OF 1989]
9 OCTOBER 1992

BANKRUPTCY: Application to annul and rescind receiving and adjudication orders - Whether application should be allowed.

The debtor was adjudged a bankrupt by consent. The debtor subsequently applied to annul and rescind the receiving and adjudication order on the grounds that:

(1) The debtor ought not to have been adjudged a bankrupt while the creditor was actively pursuing the foreclosure action.
(2) The creditor, being a secured creditor, had failed to specify in their petition their willingness to give up the security in the event the debtor is adjudged a bankrupt or give an estimate of the security as required by s. 5(2) of the Bankruptcy Act 1967.
(3) The interest on the judgement sum carried interest at the rate of 15% per annum contrary to O.42 r. 12, Rules of the High Court 1980.

Held:

[1] It is not improper to commence a foreclosure action and at the same time enforce a guarantee.

[2] A secured creditor refers to a person holding a charge on the property of the debtor as a security for a debt due to him from the debtor. The debtor not being the person who provided the security is outside the purview of s. 5(2) read with s. 2 of the Act and the question of the creditor's action violating s. 5(2) of the Act does not arise at all.

[3] The interest charged was in accordance to the judgment obtained and there had been no appeal in respect of the said judgment. The debtor had not given notice to the creditor under s. 3(2)(ii) of the Act and it was too late for the debtor to raise the issue now.

[*Debtor's application dismissed with costs*].

Cases referred to:

Bank Bumiputra Malaysia Bhd. v. Esah [1985] 2 CLJ 409 ***(foll)***